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NO. 87-207

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JOHN M. KERR
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner, John M. Kerr (hereinafter "Kerr"), was arrested on multiple charges of Bribery in Official and Political Matters, 18 Pa.C.S. § 4701, Conflict of Interest, 65 P.S. § 403(a) and (b), Criminal Attempt, 18 Pa.C.S. § 901, Macing, 25 P.S. §§ 2374 and 2375, Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. § 5101, Demanding Property to Secure Employment, 18 Pa.C.S. § 7322, Criminal Solicitation, 18 Pa.C.S. § 902, and Criminal Conspiracy, 18 Pa.C.S. § 903. (R. 61a-89a)[1]

Kerr stood trial before a judge and jury on a 216 count Criminal Information. After an eleven day trial, he was

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[1]All references to the Record ("R. ___") are to the reproduced record filed in the courts below.

found guilty of 139 counts as follows: thirty-five (35) counts of Bribery in Official and Political Matters, thirty-five (35) counts of Demanding Property to Secure Employment, thirty-two (32) counts of Conflict of Interest, thirty-four (34) counts of Obstructing the Administration of Law or Other Governmental Function, one (1) count of Criminal Attempt, and two (2) counts of Criminal Conspiracy. (R. 2a)

Trial counsel timely filed post-trial motions for a new trial challenging, inter alia, the admission of certain out-of-court statements of co-conspirators. By opinion and order dated March 7, 1985, the post-trial motions were denied. The trial judge specifically relied on this Court's pronouncements in Dutton v. Evans, 400 U.S. 74 (1970), in rejecting Kerr's

Confrontation Clause argument. (Appendix to Petition, 13a)

Kerr was sentenced on April 11, 1985. He received concurrent prison sentences totalling not less than two nor more than five years and fines totalling $6950.

Kerr, with new counsel, appealed his convictions to the Superior Court, Pennsylvania's intermediate appellate court. Appellate counsel abandoned the issues raised by Kerr in his post-trial motions. Instead, appellate counsel claimed, for the first time, ineffective assistance of trial counsel for his alleged failure "to adequately object to the admission of hearsay evidence at trial and in failing to properly preserve the hearsay issue and the related confrontation clause issue for subsequent review." In the Superior Court,

Kerr challenged the same statements as set forth in his petition to this Court.

By Per Curiam Order and Memorandum Opinion, both dated September 8, 1986, a panel of the Superior Court affirmed Kerr's judgment of sentence. In addressing this hearsay contention, the majority of the Superior Court held:

> It is next claimed that [trial] counsel's representation was inadequate in that he failed to object often enough to the admission of hearsay. In responding to the cognate assignment of error raised in post trial motions, that is, that such hearsay evidence deprived appellant [Kerr] of a fair trial, the court below found that, although there was hearsay, it was properly admissible under the "co-conspirator exception" to the hearsay rule, Commonwealth v. Dreibelbis, 493 Pa. 466, 426 A.2d 1111 (1981); Commonwealth v. Pinkins, 343 Pa.Super. 44, 493 A.2d 1365 (1985); that a proper foundation has been laid for its introduction, Commonwealth v. Kersten, 333 Pa.Super. 343, 482 A.2d 600 (1984); Commonwealth

v. Basile, 312 Pa.Super. 206, 458 A.2d 587 (1983); that appellant's conviction was not based solely on second hand testimony; and finally, that appellant's Sixth Amendment [Confrontation Clause] rights had not been violated. Dutton v. Evans, 400 U.S. 74 (1970); Commonwealth v. Meholic, 341 Pa.Super. 342, 491 A.2d 848 (1985). Our review of the record has provided us with no basis on which to disagree with the trial court's assessment. Even though counsel failed to enter any objections to the material complained of, appellant would not now be found to have been poorly represented.[4]

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4. In his thoughtful dissent, Judge McEwen expresses the very real concern that the Commonwealth is "able to present to the jury uncorroborated, unverifiable testimony that stripped the appellant of the cloak of innocence - without confrontation by appellant of his accuser, without cross-examination of the primary source of the evidence, and what is fundamentally important for this appeal, without challenge by trial counsel" (Dissenting Opinion at 2).

However, these are problems endemic to every hearsay exception, and are theoretically at

> least, overcome or vitiated by the reliability of the context in which they occur. The co-conspirator exception, which has been observed to be "the most frequently used exception to the hearsay rule," United States v. Inadi, 106 S.Ct. 1121, 1128, (1986), is no different in this regard.[2]

Kerr timely sought reargument in the Superior Court. That application was denied on October 23, 1986.

Kerr petitioned the Supreme Court of Pennsylvania for allowance of appeal. In that petition he made the same ineffectiveness of counsel claim vis-a-vis the failure to object to the introduction of these co-conspirator statements and the failure to preserve the Confrontation Clause issue. On May 5,

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[2]This passage was apparently inadvertently misquoted by petitioner when the Superior Court majority opinion was reproduced for inclusion in the Appendix to the Petition. (Appendix to Petition, 3a-4a).

1987, the Pennsylvania Supreme Court entered its Order denying Kerr's petition for allowance of appeal without opinion. Kerr now seeks of writ of certiorari to the Supreme Court of Pennsylvania.[3]

Kerr was charged as the orchestrator of a massive job selling scheme in the Office of Auditor General, the fiscal watchdog of the state government in the Commonwealth of Pennsylvania. From 1977 through early 1983, Kerr was the appointed Executive Deputy Auditor

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[3]Since the Supreme Court of Pennsylvania, in merely denying a request by Kerr to entertain his appeal, did not rule on the merits of this case, it would be inappropriate to direct a writ of certiorari to that court. Stern, Gressman and Shapiro, Supreme Court Practice, § 6.21, page 350 (6th Ed. 1986). The petition, for judicial economy, should be treated as a petition for a writ of certiorari to the Superior Court of Pennsylvania. The petition so treated should be denied.

General. He was second in command in the office, answerable only to the elected Auditor General. Testimony from employees of the Office of Auditor General disclosed that Kerr made virtually all hiring decisions for the office. (R. 1069a, 1195a, 1287a, 1302a and 1320a-1321a)

The charges against Kerr involved his dealings with several individuals in the sale of jobs and/or promotions within the Office of Auditor General. Some of the charges involved Kerr's direct dealings with job seekers. For instance, Sanford Aderson testified that he suggested a political contribution to Kerr in exchange for a job in the Auditor General's Office. Kerr accepted the offer. He directed Aderson to send $2,000.00 in four checks of $500.00 each to his attention at the Democratic State

Committee headquarters. The checks were sent and the job was awarded. (R. 865a) Aderson's testimony was corroborated by the father of the job seeker who testified that he gave the $2,000.00 to Aderson. (R. 915a-916a)

In most instances the testimony at trial showed that Kerr sold state jobs through operatives. He was charged with having conspired with separate groups of individuals to effectuate this job selling scheme. The conspiracies, though having the same goal, were geographically separate. Jobs were sold by Kerr to seekers in central Pennsylvania through Dennis Sabo, a former county campaign co-coordinator for the Auditor General. Kerr also conspired with Michael Hanna, Sr., (hereinafter "Senior"), a former county Democratic Party chairman, Nick Saittis, an

employee of the Office of Auditor General, and David S. Peters to sell jobs in the western part of the Commonwealth. With the exception of Senior (who was charged for his part in this scheme but who died before Kerr's trial), these admitted co-conspirators and accomplices of Kerr testified at his trial.

Saittis testified that he obtained a job in the Auditor General's Office by paying Senior. (R. 353a) Senior later told Saittis that this money was forwarded to Kerr. Saittis described the job selling scheme and the participants, including Senior, Peters and Kerr. (R. 385a-386a) He described meetings which he attended with Senior when Senior would make telephone calls to Kerr and discuss jobs. (R. 410a-411a) He testified that Senior gave cash, along with

applications for employment, to Kerr. Senior told Saittis this. Saittis also described how on several occasions he personally delivered money and applications for job seekers to Kerr in Kerr's state office or at another location in Dauphin County. Kerr's secretary corroborated these meetings at his office. (R. 474a)

Saittis testified that he received substantial amounts of cash from job seekers which, after sometimes keeping a portion for himself, he turned over to Senior. (R. 365a) The persons from whom he received this money subsequently received jobs in the Auditor General's Office where Kerr made virtually all of the hiring decisions.

Peters testified that he collected cash payments from job seekers and delivered them to Senior. (R. 693a-694a)

He said that he saw Senior give two envelopes said to contain this money to Kerr. (R. 707a) Peters stated that he was present at meetings between Senior and Kerr during which job sales were discussed. (R. 704a-705a)

Numerous persons who were identified by Saittis and Peters as having paid cash for jobs and/or promotions in the Office of Auditor General appeared and testified as Commonwealth witnesses. They admitted having paid various sums for jobs and/or promotions, thereby corroborating the testimony of Saittis and Peters.

Michael Hanna, Jr. (hereinafter "Junior") appeared on behalf of the Commonwealth. He testified concerning statements made by his deceased father linking Kerr to the job selling scheme. He was present on two occasions when

Senior gave John Kerr applications and cash. (R. 942a-946a) On one occasion, he saw Kerr rifle through the money. On the second occasion, Junior counted the money for Senior just before it was given to Kerr. (R. 957a) Junior testified that he was present when Senior and Kerr discussed job sales and problems in the scheme. (R. 948a) Junior corroborated Saittis' testimony in that he stated that he saw Saittis bring cash from seekers to Senior on at least five or six occasions. (R. 933a) He also testified that Peters acted as a "bag man" for his father in this job selling scheme. (R. 934a)

Dennis Sabo testified for the Commonwealth, describing job sales he effected through Kerr. He said he gave Kerr $2,000.00 for a job for one Mike Larkin. (R. 610a) He stated he made

several requests for jobs through Kerr, but only obtained jobs when money was paid. (R. 601a) The payment for Larkins' job was corroborated through the testimony of Larkins' father. (R. 669a) Sabo testified that he spoke to Kerr after he was interviewed by investigators. He said that Kerr told him to tell investigators that he (Sabo) gave the Larkin money to Kerr who in turn gave it to an official in the Auditor General's Office. A week later, in a subsequent conversation about the investigation, Kerr told Sabo to say that Kerr gave the money to another official in Office of Auditor General who had previously died. (R. 624a)

Saittis, Peters and Sabo admitted their parts in these conspiracies. Saittis and Peters entered pleas of guilty to charges arising out of this

job selling scheme and were given jail terms. Peters, in addition, admitted that he had prior theft convictions, including one involving several hundreds of thousands of dollars. He also admitted that he had paid-off policemen in the past. Sabo testified pursuant to a grant of immunity. Junior admitted that he had been charged with obstructing this investigation by trying to buy Saittis' testimony. Early in the investigation he sought to keep his father's (Senior's) name from surfacing in any inquiry into criminal wrongdoing. Having no prior record, Junior was admitted into a pretrial diversion program for his criminal activity with the agreement of the Commonwealth.

Notwithstanding his denials and the testimony of reputation witnesses, Kerr was convicted of 139 counts arising from this job selling scheme.

REASONS FOR DENYING THE WRIT

In the Pennsylvania appellate courts, Kerr raised the Confrontation Clause issue in the context of ineffective assistance of counsel. The standard for review of such claims has been announced by this Court in Strickland v. Washington, 466 U.S. 668 (1984). An issue raised in the context of the ineffective assistance of counsel is reviewed under a different standard than a similar issue challenging the admission of certain evidence which is first raised by proper objection at trial and preserved on direct appeal. While mere error may be sufficient to warrant a new trial where the issue is properly raised and preserved, the same is not true where the issue is raised in the context of ineffectiveness of counsel. In the latter situation, relief is only appro-

priate when the defendant shows that counsel made serious errors and that the errors prejudiced the defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable." Strickland v. Washington, supra. at 687.

While his petition references a claim of ineffective assistance of counsel, Kerr presents his petition, questions, and argument in the context of properly preserved trial error. He cannot now change his theory of appeal in seeking discretionary review in this Court. The "Statement of Questions

Presented for Review" as set forth in the petition does not present the same question as presented in the courts below. There the question presented was:

> Did trial counsel render ineffective assistance in failing to adequately object to the admission of hearsay evidence at trial and in failing to properly preserve the hearsay issue and the related confrontation clause issue for subsequent review?

Since the questions presently before the Court were not properly preserved below, the petition should be denied.

The court below properly decided Kerr's allegation of ineffective assistance of counsel as it relates to the admission of certain hearsay statements. See Strickland v. Washington, 466 U.S. 668 (1984). These statements were properly admitted under the co-conspirator exception to the hearsay rule. In deciding this issue, the

court below properly relied upon and followed precedential decisions of this Court on the propriety of the admission of such statements in the face of a challenge under the Sixth Amendment Confrontation Clause. See United States v. Inadi, 106 S.Ct. 1121 (1986), and Dutton v. Evans, 400 U.S. 74 (1970). See also Ohio v. Roberts, 448 U.S. 56 (1980).

Since any objection to this testimony would have been fruitless, trial counsel was not ineffective for failing to make any such objection (or for not objecting enough, as the case may be).

The questions presented by Kerr, while important, have been settled by this Court. The court below did not answer the questions in conflict with any decisions by this Court. Instead, the decision below was fully consistent with those decisions.

The opinions of the trial court and of the Superior Court show that the statements here challenged were properly analyzed under the standards set forth in Dutton v. Evans, 400 U.S. 74 (1970). Assuming, arguendo, that an independent showing of the reliability of such statements need be made before they may be admitted over a Confrontation Clause challenge, such a showing was made in the instant case. But, see, Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.")[4]

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[4]Since "(t)he admission of co-conspirators' declarations into evidence. . . actually furthers the 'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in criminal trials," ' " United States v. Inadi, 106 S.Ct. at 1127, it can hardly be seriously argued that such declarations are unreliable.

There are no special or important reasons why this Court should exercise its discretion and review this decision.

In his last argument, Kerr seems to suggest that this Court should order the Supreme Court of Pennsylvania to interpret its state Constitution in a fashion so as to grant state criminal defendants greater protections than those secured for them by the Constitution of the United States. Though the states are free to do so, California v. Ramos, 463 U.S. 992 (1983), they are not required to do so. The failure to do so implicates no federally protected right. It does not present a question cognizable in this Court on a writ of certiorari.

Kerr's argument only has appeal if the true situation here presented is ignored. The Commonwealth did not secure Kerr's conviction by reliance

upon inadmissible hearsay as he suggests in his petition. He was convicted on the testimony of live witnesses, including his co-conspirators and accomplices, who were extensively cross-examined. They properly testified to statements made by co-conspirators during the course of and in furtherance of their shared criminal design. This testimony was properly received under a "firmly rooted hearsay exception." In resolving this question, the court below applied the decisions of this Court (as it was required to do when faced with a federal constitutional question). Since the law in this area is settled, and since the settled law was properly applied below, and since this case presents no reasons why the law, restated by this Court as recently as 1986, should be reexamined, the writ should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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